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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35539

JIE AO and XIN ZHOU—
PETITION FOR DECLARATORY ORDER

THE PORT OF SEATTLE'S
REPLY TO JIE AO'S AND XIN ZHOU'S
PETITION FOR DECLARATORY ORDER

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Dated: October 11, 2011

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Pursuant to 49 C.F.R. § 1104.13, the Port of Seattle ("Port") hereby submits this Reply ("Reply") to Jie Ao's and Xin Zhou's Petition for Declaratory Order ("Petition"). For the reasons set forth herein, the Port strenuously objects to the claims made by Jie Ao and Xin Zhou (collectively, "Petitioners") and respectfully requests that the Surface Transportation Board ("Board") issue an order denying the relief sought by Petitioners and declaring that the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") and the National Trails System Act ("Trails Act") preempt the state property law rights claimed by Petitioners.

I. SUMMARY OF ARGUMENT

The ICCTA expressly and categorically preempts Petitioners' claims because they are based on state property law theories of adverse possession and prescriptive easement and constitute state regulation of matters directly regulated by the Board.[1] For this reason, the Board need not make any further factual inquiry. If the Board does not reach this conclusion, then it should hold that the ICCTA, as applied, preempts Petitioners' state property law claims because

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[1] *See CSX Transp., Inc.—Petition for Decl. Order*, STB Finance Docket No. 35662, slip op. at 2-5 (STB served May 3, 2005) ("*CSX*").

giving effect to such claims would unreasonably interfere with rail transportation. Petitioners fail to meet their burden to prove that giving effect to their claims would not unreasonably interfere with rail transportation. Even though the Port has no burden of proof, the Port demonstrates herein that giving effect to Petitioners' claims would unreasonably interfere with rail transportation. Furthermore, the Trails Act preempts Petitioners' state property law claims because they would frustrate development of a trail on a railbanked right-of-way.

II. FACTUAL BACKGROUND

The Port acquired the Washington Branch Line (the "Line") from Burlington Northern Santa Fe Railway Company ("BNSF") on December 18, 2009. The Line runs north-south for approximately 37 miles, near the eastern shore of Lake Washington, east of Seattle, in King County, Washington. Petitioners own property on the eastern shore of Lake Washington, adjacent to the Line, and allege that they are entitled, based on the state property law theory of adverse possession, to a 35 foot by 135 foot portion of the Line right-of-way, which includes a garage, concrete driveway, rockery, and retaining wall ("Parcel D"). *See* Petition at 2-3 and Exhibit E. Petitioners also claim rights under the state property law theory of prescriptive easement to utilize a private roadway within the Line right-of-way ("Parcel E"). *See* Petition at 3 and Exhibit D.

Prior to the Port's acquisition, on September 8, 2008, BNSF filed a notice of exemption with the Board pursuant to 49 C.F.R. Part 1152, Subpart F to abandon a 5.60-mile portion of the Line located between milepost 5.00, at Kennydale, and milepost 10.60, at Wilburton, in King County, Washington. *BNSF Ry. Co.—Abandonment Exemption—In King County, WA*, STB Docket No. AB-6 (Sub-No. 464X). On October 27, 2008, the Board issued a Notice of Interim Trail Use ("NITU") enabling King County, Washington ("King County") to negotiate with BNSF for use of the Line for interim trail use, pursuant to the Trails Act, 16 U.S.C. § 1247(d),

and 49 CFR § 1152.29. The Board reminded the parties that "[i]nterim trail use/rail banking is subject to the future restoration of rail service." On December 18, 2009, BNSF consummated the donation of the real property and the physical assets of the Line to the Port, entered into a Trail Use Agreement with King County, and transferred the Line's reactivation rights to King County.

On December 11, 2009, Petitioners filed a quiet title action against BNSF in King County Superior Court[2] alleging that they were entitled to a portion of the Line, based on the state property law theories of adverse possession and prescriptive easement. On May 23, 2011, the court found that Petitioners' "claims are preempted by federal law and are subject to the exclusive jurisdiction of the [Board] . . .," and dismissed Petitioners' quiet title action without prejudice. *See* Petition, Exhibit P.

III. ARGUMENT

A. The ICCTA Categorically Preempts Petitioners' State Law Claims

The Board has exclusive and plenary authority over freight rail operations in interstate commerce under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). *See* 49 U.S.C. § 10501. The ICCTA states that:

> the jurisdiction of the Board over—
>
> > (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> >
> > (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

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[2] The Port later substituted as the named defendant for BNSF as a result of the December 18, 2009 acquisition.

> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Id. § 10501(b). In an oft-quoted holding on the scope of this preemption clause, a federal district court stated that "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996).

The Board has provided a detailed framework for analyzing the scope of ICCTA preemption. *See CSX*, slip op. at 2-5. In *CSX*, the Board surveyed federal court and Board decisions interpreting ICCTA preemption and held that the ICCTA expressly and categorically preempts two broad categories of state and local actions, "regardless of the context or rationale for the action." *Id.*, slip op. at 3. For these actions, "the preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself." *Id.* (citing *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) ("*City of Auburn*")). In other words, "state or local laws that fall within one of the precluded categories are a *per se* unreasonable interference with interstate commerce." *Id.*, slip op. at 4. If a state or local action falls into one of these categories, "no further factual inquiry is necessary." *Id.*

One of these facially preempted categories is any "state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and services." *Id.* (citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *see* 49 U.S.C. § 10901 (construction, operation and acquisition); *id.* § 10902 (acquisition); *id.* § 11323 (consolidation, merger and acquisition of control). The Board regulates the railroad right-of-way that forms a regulated line of railroad. *See, e.g., City of*

Lincoln—Petition for Declaratory Order, STB Finance Docket No. 34425 (STB served Aug. 11, 2004) ("*City of Lincoln*").

In the instant case, Petitioners' state property law claim relating to the Line based on adverse possession (with respect to Parcel D) amounts to the transfer of a line of railroad subject to Board jurisdiction under section 10901 (assuming that the Petitioners are non-carriers) and, if permitted to occur, would impermissibly regulate matters squarely within the Board's purview. Petitioners' prescriptive easement claim (with respect to Parcel E) also would be a transfer of an interest in a line of railroad analogous to a 10901 transaction and, if permitted to occur, also would impermissibly regulate matters squarely within the Board's purview.

Furthermore, courts and the Board have broadly interpreted the term "state or local regulation" in the ICCTA preemption context to include the invocation of generally applicable state property laws, such as condemnation laws and prescriptive easements, by private citizens and non-governmental entities. *See, e.g., Mid-America Locomotive and Car Repair, Inc.—Petition for Declaratory Order*, STB Finance Docket No. 34599, slip op. at 5 (STB served June 6, 2005) (ICCTA preemption can apply where "no governmental entity seek[s] to regulate railroad transportation."); *City of Lincoln*, slip op. at 3 ("condemnation can be a form of regulation."); *Wisc. Cent. Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1013 (W.D. Wisc. 2000) ("condemnation is regulation.").[3]

Importantly, Petitioners ignore this ICCTA categorical preemption test throughout their Petition. Because giving effect to Petitioners' state property law claims would amount to a transfer of a line of railroad subject to Board jurisdiction and constitute impermissible "state or

[3] As a matter of policy, the Board should not require railroads to spend inordinate amounts of time policing adverse possession claims from neighboring property owners along the tens of thousands of miles of rail lines around the country.

local regulation of matters directly regulated by the Board," Petitioners' claims are a "*per se* unreasonable interference with interstate commerce," and are categorically and expressly preempted by the ICCTA. *CSX*, slip op. at 3-4. Therefore, the Board should deny the relief sought by petitioners and declare that the ICCTA preempts the state property law rights claimed by Petitioners without "further factual inquiry." *Id.*

B. Even If Petitioners Claims Were Not Categorically Preempted, The ICCTA As Applied Would Preempt Petitioners' Claims

In *CSX*, the Board established a second "as applied" prong of the ICCTA preemption analysis, holding that if the ICCTA does not categorically preempt a state or local action, the tribunal must make a "factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation." *CSX*, slip op. at 4. In *City of Lincoln*, the Board established that Petitioners have the burden to "justify [an] extraordinary request to allow a taking of actively used railroad property" and prove that proposed state property law actions "will not unduly interfere with interstate commerce." Slip op. at 5 (*aff'd*, *City of Lincoln*, 414 F.3d at 862).[4] Petitioners do not meet this burden. Petitioners do not allege sufficient facts to prove that their state property law claims would not unreasonably interfere with rail transportation.

1. Petitioners' State Law Claims Would Result In Unreasonable Interference With Interstate Commerce

If the Board finds that Petitioners' state property law claims did not constitute a "*per se* unreasonable interference with interstate commerce," it should find that the ICCTA preempts

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[4] In *City of Lincoln*, the railroad property owner alleged that it used all of its right-of-way for rail transportation purposes, and the Board held that petitioner "has not proffered convincing evidence that [the railroad] can satisfy its present and future rail transportation needs using less than the full width of its right-of-way . . . ." *Id.*; *see also City of Creede, CO—Petition for Declaratory Order*, STB Finance Docket No. 34376, slip op. at 6-7 (May 3, 2005) ("*City of Creede*") (petitioner did not meet "its burden of showing that the full width of the ROW is not, and will not be, needed for rail use.").

Petitioners' claims under the "as applied" analysis. *CSX*, slip op. at 4. Even though the Port has no burden to prove that Petitioners' claims would unreasonably interfere with rail transportation, the Port can identify several examples of how Petitioners' claims would do so.

In *Chicago Transit Authority*, the Seventh Circuit evaluated the potential "as applied" ICCTA preemption of a state condemnation action for a perpetual easement over a portion of right of way adjacent to an active line of railroad. *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 681 (7th Cir. 2011). The court determined that "[e]ven if the property was not being used and [the railroad] had no immediate plans to use the property, a taking of this property would still prevent [the railroad] from using it for railroad transportation in the future." *Id.* Therefore, "even though there may be no change in the state of railroad operations . . ., the condemnation is preempted by federal law because it is a regulation . . . that has the effect of preventing and unreasonably interfering with railroad transportation." *Id.* at 682. In affirming the Board's decision in *City of Lincoln*, the Eighth Circuit noted that "[c]ondemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses." *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858 (8th Cir. 2005); *see also Palmetto Conservation Found. v. H.J. Smith*, 642 F.Supp.2d 518, 528 (D.S.C. 2009) ("*Palmetto*") (plaintiff "could not acquire the permanent use of any part of the [railbanked] property . . . without authorization from the [Board]").

Loss of ownership of Parcel D and a prescriptive easement on Parcel E would raise significant track bed stabilization, drainage, track maintenance issues and would reduce the capacity of the railroad. These issues would cause undue interference with railroad operations if the Line were restored to service.

Railroads are vitally concerned about protecting against slope erosion. If a slope starts to fail, the soil will slough out and make the track unstable and unsafe for operations. Protection against slope erosion requires programmatic maintenance and may require capital improvements. Tomperi V.S. at 1-2. The property Petitioners claim by adverse possession (Parcel D on Petition Exhibit E) and most of the property that would be burdened by the prescriptive easement (Parcel E on Petition Exhibit D) is on the west side of the right-of-way, between the track and Lake Washington and there is a significant downhill slope on the right-of-way between the track and the lake. Petition, Exhibit Q-1. The track is in the center of the right-of-way. *See* Petition, Exhibits B and E. If Petitioners own Parcel D (35 feet wide and on the west side of right-of-way), this would leave only 15 feet on the west side of the right-of-way between the property line of Petitioners and the centerline of the track, which leaves less than 13 feet between the property line and the closest rail and even less space between the property line and the outside edge of the ties and ballast. Tomperi V.S. at 2. The slope presents serious erosion risks and this is not adequate room for track crews and equipment necessary to perform slope maintenance on the west side of the track. Tomeperi V.S. at 2. Likewise, if Petitioners gain a prescriptive easement on Parcel E, the Port will lose the right to control use of the roadway on that parcel during maintenance activities.

In addition, the slope might require stabilization. Tomperi V.S. at 2-3. Slope stabilization typically requires digging trenches horizontally or diagonally across the slope so that water runs into the trenches and is directed away from the track bed. Alternatively, a railroad owner might place heavier material like rocks/riprap at the bottom of a slope to shore up the slope. Tomperi V.S. at 2. If Petitioners own Parcel D, the railroad will not have the right to perform these types of slope stabilization and stabilization of the slope adjacent to Parcel E

would be subject to Petitioners prescriptive easement rights and not within the sole control of the Port.

If Petitioners own Parcel D and have a prescriptive easement on Parcel E, the railroad will not have the ability to construct a passing track or siding (or do anything else to expand the capacity of the railroad) on the affected portions of the right-of-way. Railroads install passing tracks and sidings so that trains can meet and pass other trains, or temporarily park trains or store cars or to otherwise allow flexibility in railroad operations. Tomperi V.S. at 3. It is not possible to know what capacity improvements might be necessary or desirable upon restoration the Line to service and it is not necessary that the Board such information in order to determine whether Petitioners' claims are preempted. The loss of ownership of Parcel D and a prescriptive easement on Parcel E would limit capacity of the Line and a limitation on capacity would be undue interference with railroad operations.

Petitioners did not meet their burden of proving that their state property law claim based in adverse possession theories would not "unreasonably interfere with interstate commerce." *City of Lincoln*, slip op. at 5. As established here by the Port, Petitioners' claims would cause undue interference with railroad operations and interstate commerce. Therefore, the ICCTA, as applied, preempts Petitioners' claims.

2. The Fact That No Railroad Operations Exist Today on the Line Is Irrelevant to the "As Applied" ICCTA Preemption Analysis

If the Board conducts an "as applied" ICCTA preemption analysis of Petitioners' claims, the Board must assess the undue interference issue with reference to the future restoration of the Line. In other words, the railbanked status of the Line does not affect the Board's "as applied" preemption analysis.

A temporary "rails-to-trails conversion" or "rail banking" under the Trails Act "does not affect a permanent abandonment." *Birt v. Surface Transp. Bd.*, 90 F.3d 580, 585-86 (D.C. Cir. 1996). During this interim trail/railbanking period, "interim [trail] use shall ***not*** be treated, for purposes of any law or rule of law, as an abandonment of the use of [railbanked] rights-of-way for railroad purposes." 16 U.S.C. § 1247(d) (emphasis added). In short, the Trails Act allows the railroad to choose to discontinue rail operations "for an indefinite period while preserving the rail corridor for possible reactivation of service in the future." *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990). So long as a line is railbanked, it remains under the Board's exclusive jurisdiction. *Id.* Therefore, the Board must analyze ICCTA preemption on this Line just as it would an active line of railroad not in railbanked status. *See County of Dutchess v. CSX Transp., Inc.*, 2009 WL 2913684 (S.D.N.Y. 2009) ("*County of Dutchess*") (ICCTA preempts state law condemnation action with regard to a railroad property subject to a NITU as it would "directly interfere with the [Board's] proceedings."); *Palmetto*, 642 F.Supp.2d at 528 (ICCTA preempts state property law action relating to railbanked line); *City of Creede*, slip op. at 8 (ICCTA preemption applies to Board-regulated property with no current operations).

C. The Trails Act Preempts Petitioners' Claims, Which Would Impermissibly Frustrate Development of A Trail On the Line

In addition to ICCTA preemption, Petitioners' state property law claims are also preempted by the Trails Act.[5] Congress intended the Trails Act to "encourage the transition of

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[5] The Trails Act provides that:

> . . . in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use

[inactive railroad rights of way] into recreational trails, and to preserve the right-of-way for possible future railroad reactivation." *Friends of the E. Lake Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260, 1274 (W.D. Wash. 2005) ("*Sammamish*"). In order to meet these Congressional goals, the Trails Act preempts state or local regulation of property designated for interim trail use where such regulation would "frustrate development of a trail on the railbanked right of way." *Id.*

Petitioners do not dispute that the Line is currently railbanked and subject to interim trail use under the Trails Act. Petition at 12. The trail's development is in its formative stages. It is entirely possible and indeed likely that the entire width of the right-of-way, including Parcels D and E will be used for the trail and the support of the trail. If the trail in the relevant segment is built on two tiers, stairs or switchback paths would be built into the trail and this could require use or alteration of property within Parcels D or E. For these reasons, the Board should hold that the Trails Act preempts Petitioners' state property law claims.

D. Petitioners Fail to Discuss Relevant Facts or Meet Their Burden of Proof

As noted above, Petitioners ignore the Board's ICCTA preemption analytical framework establishing the categorical *per se* preemption of state or local regulation and instead assert that their state law property claims will not unreasonably interfere with rail transportation. *See* Petition at 14-21. In support of this contention, Petitioners quote from a number of cases in which the courts or the Board determined that certain actions either did or did not rise to the unreasonable interference standard.[6] Petitioners then make bare assertions that their claims will

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> shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes . . . .

16 U.S.C. § 1247(d).

[6] Plaintiffs also mischaracterize *Allegheny Valley Railroad Company—Petition for Declaratory Order—William Fiore*, STB Finance Docket No. 35388 (STB served Apr. 25,

result in no unreasonable interference with rail transportation and recite a litany of facts about the subject property that have no relevance to the unreasonable interference standard. This approach falls far short of Petitioners' substantial burden of proof. *See City of Lincoln*, slip op. at 5. Applying the ICCTA preemption legal standards set forth in these decisions, the Port has established herein that Petitioners' state property law claims would unreasonably interfere with rail transportation under the "as applied" ICCTA preemption analysis.

Petitioners point out that during settlement negotiations the Port's General Counsel initially recommended settlement. Ultimately, for reasons that are appropriately not before the Board, the parties did not reach a settlement. It is not relevant to the issue before the Board to speculate about the General Counsel's basis for initially recommending settlement. It is also inappropriate to rely on a portion of the General Counsel's public statement quoted out of context as a factual assessment of whether the loss of the property claimed by Petitioners would have the effect of unreasonably interfering with rail operations in the future. In fact, the General Counsel observed that the involved property was of no use "other than holding up the rail bed." Petition at 6. This is the only evidence from the General Counsel's statement that is relevant to the issue before the Board.

IV. CONCLUSION

For the foregoing reasons, the Port respectfully requests that the Board issue a declaratory order denying the relief sought by petitioners and declaring that the ICCTA and the Trails Act preempt the state property law rights claimed by Petitioners.

2011). *See* Petition at 19-20. In this case, the Board did not evaluate whether the state property law claims would unreasonably interfere with rail transportation because the issue was "not relevant." *Id.* at 4, n.5. In the instant matter, however, if the Board conducts the "as applied" ICCTA preemption analysis, the inescapable determination that Petitioners' state property law claims will unreasonably interfere with rail transportation matters is crucially relevant.

Respectfully submitted,

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Counsel for the Port of Seattle

Dated: October 11, 2011

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VERIFIED STATEMENT OF BRYAN TOMPERI

I, Bryan Tomperi, verify and state as follows:

I am a Project Manager, Railroad Facilities, for Jacobs, a firm of engineering consultants. I am of legal age, competent to testify herein, and make this Statement based on my personal knowledge.

I am also a registered Civil Engineer with over 30 years of experience specializing in railroad facilities planning and design; railroad track design, layout, construction engineering, and inspection; railroad bridge design, layout, construction engineering, and inspection; and industrial site development grading, roadways, and utilities. Prior to my current position at Jacobs, I worked in the engineering department of Burlington Northern Santa Fe for 10 years. A copy of my resume is attached to this Verified Statement.

I have reviewed Exhibits B, D, E and Q-1 and Appendix A to the Jie Ao and Xin Zhou Petition for Declaratory Order (dated July 22, 2011) and the discussion of those Exhibits in the body of the Petition. Based on my knowledge and experience in railroad track design and layout and railroad facilities, as well as familiarity with railroad operations, I can identify several reasons that loss of ownership and control of Parcel D (shown on Exhibit E) and the loss of full control of Parcel E (shown on Exhibit D) would interfere with restored freight rail service and

why for the sake of maintenance, safety, cost control and operating flexibility a railroad operator would preserve ownership and control of the entire 100 foot width of the right-of-way.

Loss of ownership and control of Parcel D and a prescriptive easement on Parcel E would raise significant track bed stabilization, drainage, and track maintenance issues. Railroads are vitally concerned about protecting against slope erosion. If a slope starts to fail, the soil will slough out and make the track unstable and unsafe for operations. Protection against slope erosion requires programmatic maintenance and may require capital improvements. The property Petitioners claim they now own by adverse possession (Parcel D) and most of the property that would be burdened by the prescriptive easement (Parcel E) is on the west side of the right-of-way, between the track and Lake Washington. There is a significant downhill slope on the right-of-way between the track and the lake. (See Petitioners' Exhibit Q-1 and the images reproduced in Appendix A.) The track is in the center of the right-of-way. See Petitioners' Exhibits B and E.) If Petitioners own Parcel D (35 feet wide and on the west side of right-of-way), this would leave only 15 feet on the west side of the right-of-way between the property line of Petitioners and the centerline of the track, which leaves less than 13 feet between the property line and the closest rail and even less space between the property line and the outside edge of the ties and ballast. Normally, ballast should extend a minimum of one foot beyond the end of the tie. The images reproduced in Appendix A show an inadequate amount of ballast on the slope side of the tracks. If the slope is too steep to maintain a proper ballast section, the roadbed might need to be widened and this could necessitate adding fill along the slope or adding or improving a crib wall on the slope. This work, especially if a crib wall is required, could not be accomplished within the 15 foot span between the track center line and the edge of the railroad's remaining right-of way. In any case, the slope presents serious erosion risks and 15

feet (less, in fact) is not adequate room for track crews and equipment necessary to perform slope maintenance on the west side of the track. Likewise, if Petitioners gain a prescriptive easement on Parcel E, the Port will lose the right to control use of the roadway on that parcel during maintenance activities.

In addition, the slope might require stabilization. Slope stabilization typically requires digging trenches horizontally or diagonally across the slope so that water is intercepted by the trenches and is efficiently directed away from the slope. Alternatively, a railroad owner might place heavier material like rocks/riprap at the bottom of a slope to shore up the slope. If Petitioners own Parcel D, the railroad will not have the right to perform these types of slope stabilization and stabilization of the slope adjacent to Parcel E would be subject to Petitioners prescriptive easement rights and not within the sole control of the Port.

Loss of ownership and control of Parcel D and a prescriptive easement on Parcel E would raise significant operating issues and would reduce the capacity of the railroad. These issues would cause significant interference with restored railroad operations. If Petitioners own Parcel D and have a prescriptive easement on Parcel E, it will limit the railroad's ability to move the existing track towards the west in connection with construction of a passing track or siding on eastern side of the right-of-way. Railroads install passing tracks and sidings so that trains can meet and pass other trains, to temporarily park trains or store cars and to otherwise allow flexibility in railroad operations.

VERIFICATION

I, Bryan Tomperi, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 10, 2011.

Bryan Tomperi

BRYAN J. TOMPERI, PE

Railroad Division, Civil Engineer

Education

BS, Civil Engineering, 1980, North Dakota State University

Professional Registrations

Professional Civil Engineer, Washington, 1997

Professional Affiliations

Member, American Railway Engineering and Maintenance of Way Association

Length of Service

Jacobs: 20 years
Other Firms: Burlington Northern Railroad 10 years
Entered the profession in 1981; joined Jacobs in 1991

Bryan Tomperi is a registered Civil Engineer with over 30 years of experience specializing in railroad facilities planning and design; railroad track design, layout, construction engineering, and inspection; railroad bridge design, layout, construction engineering, and inspection; and industrial site development grading, roadways, and utilities.

Representative Project Experience

Road and Rail Infrastructure Project – East Blair Terminals, Port of Tacoma, WA. Project Manager responsible for design of the rail network to develop three new and expand one existing intermodal terminal on the Port of Tacoma's East Blair peninsula. The project was placed on hold after 30% design. Rail design included Arrival/Departure tracks, support tracks, intermodal loading tracks, inspection tracks, railroad crossing signals, power switches, Automatic Equipment Identification systems, and operations.

East Blair 2 Proposed Intermodal Terminal – Basis of Design, Port of Tacoma, WA. Project Manager responsible for conceptual design of the intermodal railyard for a new container terminal located on the north end of the Port of Tacoma's east Blair Peninsula. We prepared the rail portion of the Basis of Design for Moffatt & Nichol who was the overall lead on the project.

OTIS-M Study (Off Tide-flat Infrastructure Study and Modeling), Port of Tacoma, WA. Project Manager for study providing roadway traffic modeling and analysis of proposed 2015 and 2025 roadway improvements within the Port tide-flats. A second aspect of this study involved railroad operation simulations and modeling. Provided rail layouts and rail improvements to assist Port rail simulation. We prepared the traffic modeling and supported the rail study for HDR who was the overall lead on the project.

East Blair 1 Domestic Container Terminal – Basis of Design, Port of Tacoma, WA. Project Manager responsible for conceptual design of East Blair Domestic Terminal Loading and Support Railyards and other supporting rail trackage for a new container terminal located at the south end of the Port of Tacoma's East Blair Peninsula. We prepared the rail portion of the Basis of Design for the JWD Group who was the overall lead on the project.

Pierce County Terminal Phase II Planning Study, Port of Tacoma, WA. Project Engineer for the expansion of Pierce County Terminal. Conceptual design included doubling the size of the intermodal rail yard and roadway development for new gate access to PCT Intermodal Yard.

Comprehensive Tideflat Transportation Study (CTTS), Port of Tacoma, WA. Project Engineer for the future five, ten, and fifteen year development study for Port of Tacoma. Conceptual design included

Intermodal rail access and roadway development into and out of the Port area. Study looked at expansion of all existing Intermodal yards, Support yards, improvements to Tacoma Rail yard, access to mainline railroads, traffic study, and roadway improvements driven by Intermodal yard expansions.

Alaskan Way Viaduct Replacement Study- Seattle, WA. Rail designer for addressing impacts, construction sequence, and changes to BNSF Seattle International Gateway Intermodal yard as impacted by improvements and replacement of the Alaskan Way Viaduct.

Taylor Way and Lincoln Avenue Improvements, Port of Tacoma, WA. Project Engineer providing track improvements along Taylor Way and Lincoln Avenue for compensation of Alexander Avenue vacation. Alexander vacation was necessary due to new Pierce County Terminal.

Pierce County Terminal Intermodal Yard, Port of Tacoma, WA. Project Manager for the design of a 12 track Intermodal loading yard. Expansion included twelve new loading tracks and a seven track support yard. Project utilized concrete ties, asphalt paving, storm drainage, compressed air, and lighting system. Responsible for plans, specifications, estimate, and construction support.

Tacoma Rail Yard Expansion, Port of Tacoma, WA. Project Manager for the design of a 12 track support yard. Expansion included twelve new tracks totaling 20,000 track feet, utilizing concrete ties, asphalt paving, storm drainage, and new lighting system. Responsible for plans, specifications, estimate, and construction support.

Washington United Terminals Intermodal Rail Facility (Hyundai Terminal), Port of Tacoma, WA. Project Manager for the site development of existing Intermodal yard expansion including five new tracks, concrete and asphalt paving, storm drainage, and warning signal system. Responsible for plans, specifications, estimate, and construction support.

South Intermodal Yard and Lincoln Avenue Bridge Replacement, Port of Tacoma, WA. Project Engineer for the conceptual development of expanding the South Intermodal yard including eight span Lincoln Avenue overpass. Responsible for design plans, and estimate.

Hyundai Intermodal Rail Access Tracks, Port of Tacoma, WA. Project Engineer for the site development of new double track access track and double track railroad bridge, from Tacoma Rail yard to Hyundai. Responsible for plans, specifications, estimate, and construction support.

Railroad Signalization of Lincoln Avenue and Milwaukee Way, City of Tacoma, WA. Project Engineer for railroad signal installations at three railroad crossings. Responsible for plans, specifications, estimate, and construction support.

Tacoma Rail Track Upgrade, Port of Tacoma, WA. Project Engineer for the upgrade of 2200 track feet along Port of Tacoma Road. Responsible for plans, specifications, and estimate.

BCAG Headquarters Building 25-20, Boeing Commercial Airplane Group, Renton, WA. Design engineer for 12-acre site development project at Longacres Office Park. The project included complete site development and construction support services including demolition, utility relocation, grading, flood control, surface water management, utilities, and roads/parking. Responsibilities included grading, paving, and utility duct bank design.

Boeing Family Care Center Building 25-10, Renton, WA. Design engineer for 5-acre site development project for the 22,000-square foot Family Center, at Boeing's Longacres Office Park. Responsibilities included grading, paving, and utility duct bank design.

Terminal Island Container Transfer Facility, Port of Los Angeles, CA. Lead Design Engineer for operational planning, preliminary and final design for a rail yard facility to facilitate the transfer of containers between the railroad and adjacent container terminals. The facility consisted of an eight-track loading/unloading yard, a ten-track railcar storage yard, two arrival/departure tracks (each capable of

holding a 28-car double stack unit train), one bypass track, two railcar maintenance tracks, three railroad engine storage tracks, two departure tracks, and an associated facility support buildings. Designed with over 83,000 feet of track and 63 turnouts, this facility will be one of the largest Intermodal yard facilities in the United States. Overall, the facility will have the capacity to hold four 28-car double-stack unit trains (112 cars).

Berths J260-J264 Intermodal Railyard, Port of Long Beach, CA. Lead Design Engineer for operational planning, preliminary and final design for a new on-dock Intermodal container rail facility on Pier J, along with modifications to the existing ITS intermodal facility. The new facility has a total of eight loading tracks in a four and four configuration for bridge crane loading. Modifications to the existing facility were made necessary by the desire to interconnect the new and existing facilities and accommodate the Port's double-track access spine through this area. Total capacity of the two facilities is 88 double-stack railcars.

Hyundai Intermodal Rail Facility, Port of Tacoma, WA. Project Engineer for the site development of a new Intermodal yard including four new tracks, concrete and asphalt paving, storm drainage, and warning signal system. Responsible for plans, specifications, estimate, and construction support.

Terminal 106 Intermodal Yard, Port of Seattle, WA. Project Engineer. Designed conceptual layouts, prepared cost estimate and report for container service facility.

Terminal 18 Intermodal Yard, Port of Seattle, WA. Lead Design Engineer for operational planning and analysis, preliminary and final design for the Port of Seattle s first on-dock intermodal rail yard located in a 90-acre waterfront terminal in Seattle, Washington. The new yard was designed to utilize rubber-tired gantry cranes for loading rail cars on four working tracks, each approximately 2,100-feet-long and able to accommodate a 28-car double stack unit train. Planning work involved coordinating with Burlington Northern Railroad, Union Pacific Railroad, the City of Seattle, and the Port of Seattle to determine the most efficient layout and to achieve a minimum disruption of the surrounding City streets when the rail traffic, including unit trains, were arriving or departing the facility. Design services included design of four working railroad tracks of approximately 2,100 track feet each, utility systems, yard paving, concrete gantry crane runways, yard lighting, landscaping, and a revised gate entry for inbound and outbound trucking. The project includes approximately 8,000 feet of railroad trackage, yard paving, water and storm drainage relocation, temporary gate facilities, striping and electrical work.

1995 Rail Infrastructure Improvements Project, Port of Tacoma, WA. Project Engineer for conceptual design study to help the Port to plan for current and future expansion of their railroad facilities. This study looked at the Port's current rail plan and how the future development of the West Blair Terminal, Pierce County Terminal and the Sea Land Terminal would affect the capacity and operations of the Port s existing rail lines. Jacobs was able to provide the Port with a long-term blueprint for the Port's future rail infrastructure development as the West Blair and Pierce County Terminal are developed and the existing Sea Land Terminal is expanded. An immediate short-term benefit of this study was that it provided a preliminary design of an expanded Belt Line Railway railyard which is currently under construction and will expand the railcar storage capability of the Belt Line Railway which serves the Port area. Additionally, this study was expanded to include the preliminary and final design of a second access track which will allow the Mainline Railroads to access the Port s North Intermodal Yard without interrupting the movement of railcars between the Port's South Intermodal Yard (SIM) and the South Interchange Yard.

Location Study for Second Mainline Track to Terminal 5, Port of Seattle, WA. Project Engineer. Developed conceptual location of track and bridge for second mainline crossing of west waterway to Terminal 5.

South Intermodal Yard Capacity Conceptual Design, Port of Tacoma, WA. Project Engineer for conceptual design study for a new South Intermodal Yard to be built on a parcel of land purchased from the Union Pacific adjacent to the Port s existing South Intermodal Yard. For this project, we looked at numerous yard alternatives which included a still alone intermodal yard, completely separated from the existing South Yard and we looked at just making the new yard a part of the existing South Yard.

SIM - Second Access Track Project, Port of Tacoma, WA. Project Engineer for the planning and design of a second access track which will allow the Mainline Railroad to access the Ports North Intermodal Yard without interrupting the movement of railcars between the South Intermodal Yard (SIM) and the South Interchange Yard.

Puyallup International Intermodal Yard, Puyallup International, Inc., Tacoma, WA. Project Engineer for planning and design of an intermodal railroad facility for the Puyallup Indian Tribe. Project includes railroad trackage for fourteen intermodal railcars along with demolition, site grading and utilities.

Pacific Container Terminal Intermodal Railyard - Pier J, Port of Long Beach, CA. Design Reviewer for an expanded intermodal container railyard facility for the Pacific Container Terminal. This railyard facility features four loading tracks and a backreach track. These tracks are connected to form an in-terminal looped or balloon track to facilitate the arrival of trains. The project includes demolition, railroad trackage, and utility work.

SR 509 and Port of Tacoma Road Elevated Intersection Review Project, Port of Tacoma, WA. Lead Design Engineer for conceptual design study to determine the feasibility of raising the existing Port of Tacoma Road over the proposed new SR 509 Freeway while providing rail access under the road, which is one of the primary access routes into the Port. Currently, the existing Port of Tacoma Road is at-grade with railroad tracks across it, which means that whenever there is rail traffic using the crossing, the railcars block the Port of Tacoma Road for a significant period of time. This was not acceptable to the Port, given their future development plans for the West Blair and Pierce County Terminals in the area. The result of Jacobs' study was a preliminary design and associated cost estimate of a recommended elevated intersection of Port of Tacoma Road over SR 509. Currently, the Washington State Department of Transportation has taken our preliminary design and is in the process of developing final design, plans and specifications for the elevated intersection.

Mukilteo Multimodal Terminal Study, City of Mukilteo, WA. Project Engineer for a siting study project. Responsibilities included providing insights into railroad track and operating requirements, safety issues, and acting as liaison for the study team with BNSF. Options were identified for locating the commuter rail station portion of the terminal near the base of BNSF's steep, four percent gradient, access track serving the Boeing Company's 747 assembly plant at Everett, WA, and for locating terminal access roads adjacent to this critical spur track in Japanese Gulch. Due to existing track location and the topography of the area, safety issues were identified to be of major concern in the development of alternatives.

Railroad/Highway Grade Crossing Signal Systems, Lincoln Avenue and Milwaukee Way, City of Tacoma, WA. Design Engineer for preliminary signal system type study and recommendation for four cantilever and/or mast style signal systems near the intersection of Lincoln Avenue and Milwaukee Way. Dual motion-sensing train detection with switch circuit controllers to appropriately detect routing of trains through a railroad junction adjacent to the road intersection and to prevent detection during adjacent switching moves, which would not foul the crossings, were recommended.

Port of Coos Bay, Coos Bay, OR Design Engineer for inspection and plan development for repair of 12 steel truss spans across Coos Bay. Plans included tie replacement, bearing replacement, replacing lateral and sway bracing, timber bent replacement with steel piles, and pier encasement.

Metro Blue Line Railroad Bridge at Lacy Street, Adams & Smith/Macias J.V. (Contractors to the Los Angeles County Metropolitan Transportation Authority), Los Angeles, CA. Design Engineer for design plan development for replacement 101-foot long double track through plate girder span over I-5 freeway. Span 4 was damaged beyond repair by an accident related fuel truck fire and was replaced by AS/M under a Design/Build agreement with the MTA. The replacement span consisted of welded built-up girders supporting a transverse stringer floor system with a steel pan ballast deck. Responsibilities included shop plan review and construction support.

Frankford Transportation Center, Southeastern Pennsylvania Transportation Authority (SEPTA),

Philadelphia, PA. Design Engineer for the two-track elevated Guideway Structure portion of the Frankford Transportation Center (FTC) project. The Guideway Structure carries the realigned heavy rail transit Blue Line over several streets and bus transit ways, and through the new relocated FTC terminal building. The Guideway Structure has a total track length of 2,480 feet with tangent, curved. turnout, and crossover alignment sections. Involvement included developing steel and concrete superstructure alternative plans and substructure plans.

Bridge 798.79, Heidel Creek Railroad Bridge, Port of Tillamook Bay Railroad, near Timber, OR. Design Engineer for rehabilitation design, plans and specifications for repairs of 185-foot high 800-foot long steel girder railroad bridge supported by steel towers.

Bridges 806.45, 811.93, and 814.22, Salmonberry River Truss Span Bridges, Port of Tillamook Bay Railroad, near Salmonberry, OR. Design Engineer for inspection, evaluation, plans and specifications, rehabilitation design, and construction assistance for repairs of three 100 to 150-foot long steel truss span bridges over the pristine and environmentally sensitive Salmonberry River, a favorite Salmon fishery in Oregon.

Bridge 763.55, Coos Bay Railroad Bridge, Central Oregon & Pacific Railroad, North Bend, OR. Project Engineer for inspection, evaluation, and rehabilitation recommendation study for repair of 13 heavily saltwater-deteriorated truss spans in the bridge over the entrance to the Port of Coos Bay. Repairs to the two-span, 458-foot long, steel truss swing span and 11 fixed steel truss spans, varying in length from 150 to 180-feet, were investigated.

Bridge 808.95 over Bathtub Creek, Port of Tillamook Bay Railroad, near Enright (Salmonberry), OR. Design Engineer for the emergency replacement of a 30-foot steel deck girder span destroyed by major flooding in Oregon. A final design and plans were prepared for modification and utilization of a second-hand 33-foot span quickly obtained from another railroad.

Bridge 5.1, Burlington Northern Santa Fe Railway (BNSF), Klamath Falls, OR. Design Engineer for final design plans for replacement of the timber trestle approach spans in this severely skewed crossing of SR 39 which is located in a 1-degree track curve. Each new approach structure, placed at each end of the existing skewed open deck steel beam span over the roadway, consisted of one 29-foot precast prestressed concrete span and one 26-foot open deck steel beam span with one skewed end founded on concrete capped, exposed "H" pile piers. The existing skewed roadway span received a new solid timber deck and new skewed supporting piers consisting of precast concrete caps on unsymmetrical, bi-directionally battered, exposed "H" piles.

BNSF Bridge 118.91A, Shawnee Jct., WY; 1.10A, Black Thunder, WY; 444.66A, 444.79A and 448.83B, Ardmore, SD. Design Engineer for final design plans for the addition of these new, second mainline track bridges constructed adjacent to existing bridges. The 48- to 174-foot long bridges consisted of 35- to 45-foot composite ballast deck beam spans or 26- to 40-foot prestressed concrete spans founded on concrete capped, exposed "H" pile piers.

Bridge 93.6, BNSF, Bellingham WA. Design Engineer for final design plans for replacement of these timber trestle bridges with new bridges consisting of precast prestressed concrete spans founded on concrete capped, exposed prestressed concrete pile piers.

SR 509 Freeway Viaduct, Washington State Department of Transportation, Tacoma, WA. Lead Design Engineer for trackwork revisions to numerous Burlington Northern Santa Fe Railway (BNRR) and Union Pacific Railroad mainline and yard tracks to accommodate the new SR 509 Freeway Viaduct.

Port of Grays Harbor Marine Terminal Rail, Phase 3, Aberdeen, WA. Design Engineer for operation planning and preliminary and final design of 4,000 feet of railroad trackage for an automobile loading facility. Design services including planning, track layout, paving, drainage, and lighting. As part of Phase 3, developed plans. specifications, and cost estimates for the rehabilitation of several miles of existing Port trackage.

Intermodal Yard Compressed Air System, Port of Tacoma, WA. Lead Civil Engineer for predesign study for installation of a compressed air system at the North Intermodal Yard, for brake tests on railcars using the facility.

Auburn Way South/Burlington Northern Railroad (BNRR) Bridge 102.5, City of Auburn, WA. Design Engineer for track work revisions for replacement of bridge carrying BNRR over Auburn Way South. Assisted with development of construction sequence for replacing the existing bridge with new longer bridge spanning the widened roadway, with minimal interruption to railroad/roadway traffic.

Boeing Surface Water Management Project, Boeing Company, Renton, WA. Design engineer for grading for Longacres Office Park surface water management project. The project will finalize surface water management features on 10 acres of property planned for a corporate office complex, and accommodate future development options for about 164 acres of adjacent undeveloped Boeing property. Responsibilities included final design of grading.

Experience with previous firm

Railroad Engineering, BNRR, Billings, MT. Field engineer responsible for collecting field survey information for bridge replacement projects, construction of industry tracks and mainline railroad tracks. Designed track layouts serving industries, modifications to rail yards, passing tracks, and improving existing railroad alignments. Prepared design plans to be used for construction of railroad work and field staking for construction of trackwork.

Bridge Maintenance, BNRR, Seattle, WA. Structural designer for railroad bridge maintenance. Duties included design and preparation of plans for replacement ties, timber ballast decks, concrete culverts, simple span bridge structures using standard concrete elements, and steel repairs. Responsibilities also included coordinating services from engineering consultants and contractors on bridge projects, checking of plans, estimating, contract documents, material forecasting, and field inspection of bridges. Checked shoring designs of contract work affecting railroad structures.

Bridge Replacements, BNRR, Seattle, WA. Design engineer, including duties of structural designer, plus estimating bridge replacement costs, review of plans prepared by consultants, and field inspection of proposed maintenance and replacement work.

Snohomish River Bridge, BNRR, Snohomish, WA. Structural engineer and resident engineer on project over Snohomish River, requiring replacement of three trusses totaling 406 feet. Total project cost was $2 million.

Specialized Professional Competence

- Railroad facilities planning and design
- Railroad track design, layout, construction engineering, and inspection
- Railroad bridge design, layout, construction engineering, and inspection
- Industrial site development grading, roadways, and utilities.

Office: 043 Bellevue, Washington
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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2011, I caused the foregoing **The Port of Seattle's Reply to Jie Ao's and Xin Zhou's Petition for Declaratory Order** to be served via e-mail on the following parties:

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